IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 877 OF 2004

Shri Bajirao Dattu Patil ... Appellant

V/s

Shri Sarjerao Hari Hande
(since deceased through his
heirs and legal representatives)
Laxmi Hari Hande & ors. ... Respondents

Mr. P.S. Dani with S.M. Kamble for the appellant.

Mr. Sanjeev P. Kadam for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 4TH JULY, 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the District Judge, Kolhapur dated 9.3.2004 dismissing the appeal and confirming the judgment and order passed by the Civil Judge, Jr.Divn., Malkapur dated 16.12.1998 dismissing the plaintiff's suit for perpetual injunction on the ground that the defendant had been causing obstruction to his possession of the space of 200 ft. x 80 ft. i.e. the property No.19/2 situated at Village Supatre.

2. I have heard the learned counsel for both parties. Perused the record including the copy of the Court Commissioner's report annexed to the appeal memo alongwith the copies of the pleadings of both parties.

3. It was the case of the plaintiff that the suit property is owned by him and he purchased it from one Maruti Hande and from that day he is in possession as a owner. It is the specific case of the plaintiff that the suit property is one space and he intend to erect fence around it. The space of defendant is at West side and adjacent to suit property. According to the plaintiff, on 30.12.1986 he went towards the suit property for erecting wire-fencing and at that time the defendant came there and obstructed him and hence the suit came to be filed.

The defendant contested the suit on the ground that boundaries and description of the property mentioned in the plaint were incorrect and according to him, the property No. 19/2 never belonged to Maruti Hande and, therefore, allegations in that respect are challenged. The defendant has also claimed that the entire property of Survey No.19/2 is exclusively belonging to him and hence the suit is sought to be dismissed on this ground

with costs.

4. The learned Trial Judge, after hearing both parties, adjudicated the dispute on merits and came to the conclusion that the plaintiff had failed to establish his possession to the suit property on the basis of title and, therefore, plaintiff was non-suited. The lower appellate Court endorsed to the findings recorded by the Trial Court and dismissed the appeal and hence the present appeal.

5. At the outset, it may be noted that the perusal of judgment of both the Courts below do show that they have relied upon the Court Commissioner's report of which copy is annexed to the appeal memo. Perusal of the Court Commissioner's report itself shows that the purpose of appointing the Court Commissioner was not fulfilled at all. According to the Court Commissioner, she was unable to measure the land and she has opined that it was only possible through concerned expert authority to do so. If it is the state of fact, then reliance put up by both the Courts below on the report of the Court Commissioner appears to be not proper. In my considered view, the lower appellate Court, under the circumstances, should have appointed the expert Court

Commissioner i.e. D.I.L.R. in order to admeasure the entire suit property including the adjacent property of the defendant so as to ascertain alleged holdings of respective parties. In absence of doing so, in my considered view, reliance put on the Court Commissioner's report by both the Courts below, would not be sufficient to adjudicate the dispute in proper perspective.

Under the circumstances, I am inclined to remand the matter for limited purpose with direction to appoint the Court Commissioner to admeasure the property in question so as to adjudicate the dispute properly.

6. Hence, the judgment and order passed by the District Judge, Kolhapur dated 9.3.2004 is hereby set aside.

The matter is remanded to the lower appellate Court with direction that D.I.L.R. shall be appointed as the Court Commissioner to admeasure the suit property as well as the adjacent property of the defendant so as to ascertain the correctness of the allegations made by both parties.

The District Judge, Kolhapur, shall take necessary steps

for appointment of the Court Commissioner including the fixation of his fees and other formalities.

On receipt of the report of the Court Commissioner, the District Judge, Kolhapur shall hear both parties in the appeal afresh and adjudicate the dispute on merits.

The appeal to be heard and disposed of as early as possible after giving notice to both sides and in any case within four months from the date of receipt of the writ of this Court. In the meantime, parties shall maintain status-quo with regard to the suit property as on today.

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